Visitors and events

In October AUT Law School hosted a group of senior students (pictured below) from Baradene, Diocesan and Auckland Girls' Grammar School with an interest in studying law at university. The day-long programme involved observations of the courts in action, presentations from Her Honour Judge Mathers and representatives of the Police Prosecutions and Community Probation Service, and a challenging role play exercise led by the Law School's criminal law experts Marnie Prasad and Paul Shenkin.

October also saw the Law School, in conjunction with the Auckland Women Lawyers' Association (AWLA), hosting a careers evening for AUT law students. Four young lawyers from AWLA (currently working at Bell Gully, Meredith Connell, Wilson Harle and Auckland City) talked about applying for their first jobs and their careers to date since leaving their respective law schools, sharing valuable career insights with law students at AUT.

Labour market productivity has remained an elusive goal of employment law reform on both sides of the Tasman. In November, AUT Law School and the Employment Law Forum hosted a successful public seminar supported by a wide-ranging audience of judges, practitioners, academics, unionists and students, at which leading Australian employment law specialist, Professor Andrew Stewart, assessed the effect of the 2009 Australian Fair Work Act on workplace productivity in the economy across the ditch.

Upcoming public lecture: Guilty of Doing Nothing? Omissions, Duties and Crimes?

As part of the 2012 New Zealand Law Foundation Distinguished Visiting Fellowship Programme, AUT Law School is hosting a public lecture featuring Professor Andrew Ashworth of Oxford University. In his address Professor Ashworth questions whether it is right to convict a person for doing absolutely nothing, or are there situations when citizens ought to have a duty to act and to intervene, reinforced by criminal sanction? Beyond well-established duties, should we also recognise some broader civic responsibilities to help others?

Lecture Thursday 22 March, 6pm - 7pm WF 303
Refreshments from 5:15pm in WF Level 9
Faculty of Business and Law, AUT University
Cnr Wakefield Street and Mayoral Drive

For catering purposes, please RSVP Michelle D'Souza:
mdsouza@aut.ac.nz or phone 921 9999 ext 5475

Tax Compliance Project

Recently the inter discipline tax team headed by Professor Chris Ohms and Dr Karin Olesen commented on the proposed $1billion IRD computer system upgrade announced by John Key. Ohms and Olesen are members of the Tax Compliance Project, a group which is reworking the compliance model used by both the NZ IRD and the Australian ATO. The new model will promote a common "ANZAC" tax administration system with a single "ANZAC" tax file number and information sharing between the two agencies. This will fit well with the spirit of the current Single Economic Market and any further moves towards a common border. A single "ANZAC" binding ruling will reduce compliance costs for businesses setting up on either side of the Tasman and that can only benefit both economies.

Ohm's and Olesen's statement is available at: http://www.newstalkzb.co.nz/auckland/news/nbnat/870879424-IRD-upgrade-could-have-many-benefits

Report from Durban - UN climate talks December 2011

In December AUT Law School's Vernon Rive attended the United Nations Framework Convention on Climate Change 'COP17' Conference in Durban, South Africa, reporting on the talks for New Zealand's Idealog Magazine and blogging on www.point-source.co.nz.

COP17 had a strong New Zealand presence with the NZ government delegation led by International Climate Change Negotiations Minister Tim Groser. Former NZ Climate Change Amabassador Adrian Macey (above) chaired the key AWG-KP Committee, responsible for negotiations on the future of the Kyoto Protocol.

COP17 was the first time that international climate talks have been held on the African continent. The impacts of climate change on developing countries – particularly those in Africa – featured in formal and informal discussions and side events.

Late in the second week of the two-week conference, lack of progress and concern at perceived inattention to the needs of developing countries sparked NGO-initiated protests within the venue. A number of youth delegates (including New Zealanders) were evicted and 'debadged'.

COP17 President Maite Nkoana Mashabane brought her own distinct style to the talks, including use of 'indaba' (a Zulu tradition - a meeting of elders where important or contentious issues are discussed).

Well into 'injury time', a day and a half after the conference had been scheduled to conclude, a very public 'huddle' of representatives of the key nations resulted in a breakthrough, ultimately clearing a way for an agreement billed the 'Durban Platform'.

Staying in touch

If you would like more information about AUT Law School and what we are doing contact:
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AUTlaw editorial team: Suzanne McMeekin, Vernon Rive and Mike French

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AUT UNIVERSITY LAW
NEWS FROM AUT LAW SCHOOL
Autumn 2012

TV Now, BitTorrent and Dotcom: conundrums in cyberspace

By Professor Louise Longdin and Senior Lecturers in Law Suzanne McMeekin and Janine Lay

***Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34**

A recent controversial Australian decision would seem to have disturbed the delicate balance between various stakeholders in the copyright arena, prompting sports rights-holders to appeal the decision and lobby for legislative change. Telstra, one of the parties, holds the exclusive rights to stream live, free to air NRL and AFL matches over the internet using its T-Box technology. Optus, through its competing TV Now service (utilising internet cloud technology), offers Australian customers the ability to make a recording and play back virtually live, free to air television programmes, including AFL and NRL games, on computers and mobile devices. Telstra and others claimed that Optus' service infringed their copyright interests. Section 111 of the Copyright Act 1968 (Australia), the counterpart to our own s84, was engaged in the proceedings. This section and related provisions provide an exemption permitting copyright users to make recordings of broadcasts for personal use and viewing at a more convenient time (time-shifting) without infringing the Act. Australia's technology neutral copyright regime allowed the Court to liken the Optus technology to an updated home VCR. It found that Optus customers, not Optus, were the persons recording the broadcasts and were thus within the ambit of the s 111 exemption. The finding has effectively marginalised rights-holders with sunk costs in what they thought were highly lucrative investments. The outcome of the appeal and / or legislative response across the Tasman has potential relevance here in New Zealand.

We too have embraced technological neutrality in recent amendments to our copyright legislation and this case illustrates the conundrum legislators face when they are attempting to strike the appropriate balance between rights holders, consumers and other players such as Optus in this type of legislation.

***AMP v Persons Unknown* [2011] EWHC 3454 (TCC)**

In December last year the Technology and Construction Court (UK) (TCC) granted an interim injunction to prevent the transmission, storage and indexing of certain digital photographic images belonging to university student AMP. AMP's mobile phone, containing photographs of an explicit sexual nature, was lost or stolen in mid 2008. Later that year images from the phone were uploaded to Swedish site, Piratebay, hosting BitTorrent files. The BitTorrent file sharing protocol is used to legitimately distribute free open source software but also facilitates illegitimate file sharing. Popular files can be distributed quickly and efficiently amongst a "swarm" of BitTorrent users; the swarm can download from, and upload to (seed), each other simultaneously. The health of any ".torrent" file is dependent on the size of the swarm. The larger the swarm is, the more prolific the dissemination of the file. It is the health of the "swarm" that the TCC's landmark injunction seeks to annihilate. While the injunction is based on readily understood concepts of privacy and harassment, it is interesting that it is targeted at "persons unknown", potential conventional downloaders as well as any potential BitTorrent users. It provides, inter alia, that BitTorrent users, who can be identified during the seeding process, are to cease seeding any ".torrent" file containing AMP's name. Professor Andrew Murray of the London School of Economics, who provided witness statements in *AMP*, maintains that once the key seeders are removed the ".torrent" file will "wither on the vine". It remains to be seen whether Murray's optimism is justified. At the time of writing, Murray was claiming the file had withered but others believed there had been a "re-swarm."

***USA v Kim Dotcom et al*, No. 12–cr–3, in U.S. District Court for the Eastern District of Virginia**

File sharing is also the focus of the Dotcom drama that unfolded on our doorstep in January. Kim Dotcom and four of his co-workers are presently awaiting extradition proceedings here in New Zealand. In late February a United States grand jury added further copyright infringement charges against Dotcom and co who run the file sharing website Megaupload which, like Piratebay, allegedly facilitates illegitimate file sharing opportunities. According to the latest indictment, of Megaupload's approximately 66 million users, only a very small proportion ever upload a file which would indicate most use the site to download copyrighted material including popular television shows, movies and music. At the time of writing Kim Dotcom has been granted electronic bail and the Megaupload service has been shut down. The Crown has appealed.

For an insightful look at this file sharing conundrum, see Professor Longdin's and Senior Lecturer Pheh Hoon Lim's article, "P2P Online File Sharing: Transnational Convergence and Divergence in Balancing Stakeholder Interests [(2011) EIPR, 33(11), 690-698] which tracks the responses of rights-holders and law makers that unauthorised file sharing - copyright's most recent moral panic – typically generates.

Introducing new Professor of Law, Julie Cassidy

I am delighted to be taking up my new position as Professor of Law at AUT Law School. I was previously an Associate Professor at Deakin University in Australia. It's refreshing to again be part of a new law school and I'm looking forward to teaching tax and corporate governance at AUT this year. In terms of tax law, my move to New Zealand has been perfectly timed. My particular area of interest is anti-tax avoidance measures. The recent *Alesco New Zealand Ltd v CIR* (HC Auckland CIV – 2009- 404-2145, 12 December 2011) decision provides a good example of the application of the Supreme Court's relatively new 'parliamentary contemplation test' (*Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289). In *Alesco* the High Court had to decide whether the financing structure between a parent company and a subsidiary was void under the general anti-avoidance provisions of the income tax legislation. It found that the "agreement", structured as optional convertible notes which gave Alesco's parent company the option of being repaid the loan amount ($78m) or receiving Alesco shares to discharge the debt, was not one to lend money on particular terms but rather a way for members of the Alesco group to obtain New Zealand tax benefits, thereby reducing the transaction costs. Accordingly, it concluded that the arrangement was a facade and Parliament had not contemplated the deductibility of these amounts where there was no real economic cost to the taxpayer. Like the High Court I thought it was blatant tax avoidance.

Our students

The President of the AUT Law Students Society Amanda Ferris highlights some of the milestones for AUT law students this year and explains why 2012 will be the year of many 'firsts'.

I am certainly looking forward, like the rest of the Executive, to a very busy 2012 and a year that has some pretty special 'firsts' for our student body.

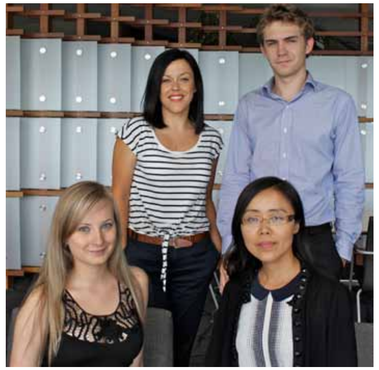
Our first cohort of students will complete their law degrees at the end of the year and to celebrate this milestone we have planned a ball in August and a leavers' dinner (sponsored by the Institute of Professional Legal Studies) in October.

Our Society has now become a fully integrated member of the New Zealand Law Students' Association Incorporated, the parent body of the six on-campus Law Student Societies in New Zealand.

Our first summer clerks return from their stints at Buddle Findlay and Kensington Swan, and we are looking forward to hearing about, and learning from, their experiences.

We are entering the Russell McVeagh Client Interviewing Competition for the first time this year (an internal competition was held at AUT at the end of last year, so our students are keen and well prepared). AUT Law students will also be competing again in the Buddle Findlay Negotiation Competition that we took part in for the first time last year.

And last but certainly not least, we have some first class guest speakers coming to the Law School – the Right Honourable Dame Sian Elias, Chief Justice in April and the Right Honourable Helen Clark in August.



Amanda Ferris (President), Miles Beresford (Administrative Vice-President), Anna Cherkashina (Education Vice-President), Sarah Hou (Treasurer)

Under construction: AUT Law School work placement programme

Like many students, AUT law students are keen to get professional experience before they graduate. Both through the summer clerk programme, and outside of it, a number of our students are working part-time in law firms as they progress through their studies. As many of you in the profession will know from your own experience, work placements are hugely beneficial to students and potential employers, giving both a chance to test the waters in a 'no obligations' context.

AUT Law School is currently working with the Law Students Society, law firms, patent attorneys, law centres, accountancy practices and other organisations on a framework for a work placement programme which we plan to launch this year. The idea is to facilitate opportunities for organisations (whether or not already participants in the formal summer clerk programme) who might benefit from short-term student placements by having access to a group of talented, enthusiastic and hard-working law students hungry for experience in the practice of law. The AUT scheme would be directly supported by the Law School in a structured but flexible way that caters for the varying needs and circumstances of participants.

If you would be interested in talking to us about involvement in this scheme, please contact Vernon Rive at vernon.rive@aut.ac.nz or 027 281 8215.

Studying law at AUT: spotlight on electives

A distinctive feature of the AUT LLB is the deliberate favouring of a commercial approach to the degree. Our degree includes compulsory papers in Intellectual Property, Company Law, Legal Ethics and Civil Litigation, Arbitration and Dispute Resolution.

The commercial approach is also reflected in the range of elective papers offered in the third and fourth years of the degree. Two of 12 new elective papers being offered in 2012 are profiled below.

Law in Cyberspace
This elective paper, which examines contemporary issues arising from new communications and information technologies, is taught by Senior Lecturer Michael Adams and Professor Louise Longdin. Topics covered include computer crime, questions of jurisdiction, intellectual property rights, freedom of information, tortious wrongs, e-commerce and contract, internet regulation and the liability of online service providers.

Alternative Business Structures
As noted above, Company Law is a compulsory paper on the AUT law degree. The Alternative Business Structures elective paper examines the main structures, other than companies limited by shares, used to conduct business in New Zealand.

The paper, which is taught by Senior Lecturer Helen Dervan, looks at the law relating to partnerships, agency, joint ventures and other types of corporate or contractual arrangements and evaluates their use and efficacy in differing business contexts.

Other electives
Other elective papers being offered on the AUT law degree in 2012 include: Commercial Equity; Commercial Transactions; Contemporary Issues in Copyright Law; Current Issues in Land Ownership; Employment Law; Family Law; Insolvency and Receivership; International Environmental Law; Interpreting Contracts; Issues in Sale of Land; Law and Economics; Legal Research Methods; Legislation and Law-Making in New Zealand; Principles of Taxation; Remedies in Private Law; Resource Management Law; Tax Planning, Tax Avoidance and Tax Evasion; Trade Marks and Unfair Competition; Supervised Legal Research; and Wills, Trusts and Succession.

Our staff

We have had a great response to the Law School's Christmas 2011 Boston Legal-themed photo-shoot. Visit our Facebook page (www.facebook.com/autlawschool) for more photos of the set design and construction and the photo-shoot itself. Thanks to the AUT Library for the loan of its collection of NZLRs, to Belinda Bradley of Smash Photography for handling the shoot, and the cast and crew of AUT Law School for the big effort. Don't call us...

Standing left to right: Mike French, Pam Nuttall, Helen Dervan, Craig Dickson, Nick Drake, Michael Adams, Ian Eagles, Dennis Moodley, Katherine Ritchie, Shirley Quo, Thomas Nkomo, Rod Thomas. Sitting left to right: Matt Barber, Mary-Rose Russell, Janine Lay, Louise Longdin, Marnie Prasad, Paul Shenkin, Suzanne McMeekin, Vernon Rive

Cryptic corner

Have a go to win a bottle of Veuve Clicquot

The response to our first Cryptic Corner was overwhelming. To refresh your memories, the clue was: "Nasty bile for crew living under the mountain perhaps. This judge's broad test for determining the existence of a duty of care in the tort of negligence continues to be applied in the New Zealand Courts. Who is it?"

The answer, of course, was (Lord) Wilberforce who delivered the leading speech in *Anns v Merton London Borough* (1978). There were two cryptic elements: first, 'bile for crew' provided an anagram of Wilberforce; secondly, 'living under the mountain' was a reference to Maurice Gee's novel Under the Mountain which featured a race of symbiotic organisms called the Wilberforces.

Congratulations to all of you who got the correct answer. The winner was Sarah Grainger, an Associate at Langton Hudson Butcher.

So good luck with the clue for this issue of AUTlaw which is:

Bill blocks local claim over car write-off producing classic contract cold case. What is the name of the case? (7, 1, 8, 5, 4, 2)

Email your answer to mike.french@aut.ac.nz by 4.00 pm, Monday 26th March. All correct answers received by the deadline will go into a draw to win a bottle of Veuve Clicquot.

Sarah Grainger, winner of last issue's Cryptic Corner.

No Re-*Morse*: should public disorder be part of offensive behaviour?

by Marnie Prasad and Mary-Rose Russell, Senior Lecturers in Law

For over 30 years, the Summary Offences Act 1981 (the Act) has played a significant role in regulating anti-social behaviour. The Act contains an array of offences considered more minor than those in the Crimes Act 1961 and elsewhere; many of its offences are punishable by fine only. While the Act principally comprises specific offences it also contains some catch-all offences which are capable of covering an extensive range of unacceptable behaviour. One such offence states that "Every person is liable to a fine not exceeding $1,000 who, in or within view of any public place, behaves in an offensive or disorderly manner" (s 4(1)(a)). It has been an effective weapon in the legal armoury available to the police, facilitating their management of problematic public situations; particularly as the Act furnishes police with an accompanying power of arrest without warrant (s 39). Defendants on the receiving end of s 4(1)(a) have frequently challenged the section's application, and a body of case law has evolved on its meaning, providing well understood parameters for policing.

The Supreme Court of New Zealand has of late added to this jurisprudence in two substantial judgments: *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 and *Morse v Police* [2011] NZSC 45, (2011) 25 CRNZ 174. Both are protest-related cases brought under s 4(1)(a), the earlier relating to disorderly behaviour, the latter to offensive behaviour. In each case the defendant was convicted after a District Court hearing and failed in appeals to both the High Court and the Court of Appeal, but ultimately had their conviction set aside by the Supreme Court. These Supreme Court decisions have altered the offensive/disorderly behaviour statutory landscape in New Zealand.

In both *Brooker* and *Morse* the Supreme Court read into the provision a public order element. The Court's starting point for so doing is that s 4 is situated under a general descriptive heading "Offences against public order". The Court also considered that the basic principle of certainty in criminal law, and the need to accommodate the competing value of free expression, warranted such an interpretation. However, was such a reading in required? Section 4(1)(a) does stipulate that the conduct must be "in or within view of any public place". The effect of these decisions is that there are now two "public" requirements – one expressed ("in or within view of any public place"), and the other implied (the new public disorder element) – for what are very minor offences.

The Supreme Court, by supplementing the ordinary words of section 4(1)(a), has added a gloss to the provision and has muddied the distinction between disorderly and offensive conduct. Section 4(1)(a) distinguishes disorderly and offensive behaviour; they are alternatives in the provision. The use of the word *dis-order(ly)* in the "disorderly behaviour" limb of s 4(1)(a) implies a public order element. Offensive behaviour, however, does not inherently involve a "public disorder" notion. These were designed as catch-all phrases to deal with a variety of anti-social behaviours not all of which, by their nature, disturb public order. In the authors' view, the Supreme Court's decisions detract from the long-standing utility of s 4(1)(a).

A more in depth examination of this topic may be found at:
Marnie Prasad and Mary-Rose Russell The Supreme Court Revisits the Summary Offences Act: Has the Policeman Lost His Friend? (2011) Social Science Research Network <http://ssrn.com/abstract = 1968668>

New books

Refusals to License Intellectual Property: Testing the Limits of Law and Economics

Refusals to License Intellectual Property: Testing the Limits of Law and Economics by Professor Ian Eagles and Professor Louise Longdin was published by Hart Publishing, Oxford, in December 2011.

The book provides a detailed study of responses by courts and enforcement agencies in different jurisdictions to unilateral refusals to license intellectual property. There is often an uneasy interaction between law and economics in this area. The authors conclude that the tension between intellectual property and competition policy highlights the need for a fresh analytical framework that will reintegrate the two disciplines.

That approach will assist in minimising often illogical and unworkable black-letter solutions to the refusal to license problem, and maximising economically defensible outcomes in individual cases.

Environmental and Resource Management Law

Vernon Rive contributed three chapters to the new edition of *Environmental and Resource Management Law*, the Derek Nolan-edited leading textbook on environmental law in New Zealand published in September 2011 by LexisNexis. Vernon's chapters cover Environmental Assessment, Forests, Trees and Native Plants, and (with co-author and Chapman Tripp Resource Management Partner Paula Brosnahan) a new chapter for the publication - Landscape and Visual.

The Leaky Buildings Crisis

Rod Thomas has written two chapters in *The Leaky Buildings Crisis*, published in late 2011 by Thomson Reuters. The book is an attempt to identify the tough issues arising in this complex area and come up with useful responses. It includes chapters by 19 academics and practitioners from a wide range of specialisations. In the forward, Sir David Baragwanath writes, "the expert authors provide a topical and illuminating account of legal and factual implications of an unnecessary and continuing human tragedy." Rod's chapters deal with different aspects of remediation of leaky unit titled buildings.

Win

To go in the draw to win a signed copy of one of this issue's featured books email mike.french@aut.ac.nz by 4.00 pm, Monday 26 March identifying your choice of book.